SUPREME COURT OF VICTORIA

COURT OF APPEAL

No 3820 of 2009

1144 NEPEAN HIGHWAY PTY LTD — Appellant

v

ABNOTE AUSTRALASIA PTY LTD (formerly known as LEIGH MARDON AUSTRALASIA PTY LTD) — Respondent

---

JUDGES	WARREN CJ, NETTLE and BONGIORNO JJA
WHERE HELD	MELBOURNE
DATE OF HEARING	26 November 2009
DATE OF JUDGMENT	18 December 2009
MEDIUM NEUTRAL CITATION	[2009] VSCA 308
JUDGMENT APPEALED FROM	[2009] VSC 317 (Pagone J)

CONTRACT — Construction of dispute resolution clause — Meaning of 'appoint' — Distinction between 'appoint' and 'nominate' — Appointment of independent expert by independent third party — Binding nature of appointment — Terms of appointment — Objection to expert's terms — Indemnity and release — Implied term that the terms of the expert's engagement be 'reasonable' — Certainty of terms — Injunction to compel engagement of expert.

Appearances:	Counsel	Solicitors
For the Appellant	Mr R A Brett QC with Mr C R Northrop	Bazzani Scully Brand Lawyers
For the Respondent	Mr J J Gleeson SC with Mr M H Whitten	Corrs Chambers Westgarth

WARREN CJ,
NETTLE JA,
BONGIORNO JA:

1. This appeal concerns the operation of a dispute resolution regime in an agreement between a landlord and a tenant as to a new lease. By that agreement, dated 19 November 2008, 1144 Nepean Highway Pty Ltd ('the landlord') agreed to undertake building works on land which it owned on the Nepean Highway, Highett, and lease that land to Leigh Mardon Australasia Pty Ltd ('the tenant').[1] In fact the tenant had occupied the property for many years before the date of the agreement and was, at that date, occupying the premises as a monthly tenant, a prior lease having expired.

2. The agreement to lease was subject to a condition precedent which required the landlord to obtain, by no later than 31 January 2009, a town planning permit which would allow the proposed premises to be used for the tenant's purposes and would enable the landlord to carry out contemplated building works. The condition further provided that, if the necessary permit was not obtained by the specified date, either party could give the other 30 days' notice of its intention to terminate the agreement. If such a notice was given, the agreement would be thus terminated unless within that 30 days the permit was obtained.

3. In fact, a town planning permit was not obtained by 31 January 2009. On 2 February 2009 the tenant served notice on the landlord of its intention to terminate the agreement for failure of the condition. However, within the 30 days allowed, on 16 February 2009 the relevant responsible authority, the City of Kingston, issued a town planning permit, with conditions which had to be satisfied before development could commence.

4. Notwithstanding the issue of that planning permit, by early April 2009, the Council had still not endorsed a detailed landscaping plan so that proposed civil

---

[1] After filing this proceeding, Leigh Mardon Australasia Pty Ltd changed its name to, and is now known as, Abnote Australasia Pty Ltd. In this judgment, it is referred to as 'the tenant'.

works in a carpark at the site (being part of the landlord's works contemplated by the agreement) could not proceed. By letter dated 7 April 2009, the tenant sought confirmation from the landlord that the permit required by the agreement had not been obtained and that accordingly the agreement had been terminated on 4 March 2009 in accordance with the tenant's notice of 2 February. The landlord did not accept the tenant's assertion that the agreement had been terminated so that, on 22 April 2009, the tenant served a notice of dispute on the landlord pursuant to cl 12.1 of the agreement, the question in dispute being whether, having regard to the events which had occurred, the conditions precedent to the agreement had been complied with and, consequently, whether the agreement was still on foot or had been effectively terminated for non-compliance by the tenant's notice of 2 February 2009.

5. Clause 12 of the agreement to lease is in the following terms:

12. Dispute Resolution

12.1 Notice of dispute

If a dispute or difference arises or the parties fail to agree in connection with any matter arising out of or relating to this agreement (except for any dispute or difference or failure to agree on the amount or payment of rent or outgoings under the Lease), either party may give the other party a notice of dispute in connection with this agreement (**Dispute Notice**).

12.2 Parties must attempt to resolve dispute

Any dispute must be referred to the Landlord's representative and the Tenant's representative who must meet together in an endeavour to resolve the dispute within seven Business Days of the giving of the Dispute Notice.

12.3 Referral of dispute

If within seven Business Days after delivery of a Dispute Notice, the parties have not been able to resolve the dispute either party may request that the dispute be referred to an appropriately qualified and experienced independent expert.

12.4 Appointment of independent expert

Subject to clause 12.6, a party receiving a request under clause 12.3 is not obliged to agree to the selection of an appropriate qualified and experienced independent expert. If

the parties are unable to agree on an appropriate expert either party may request the appointment of an appropriate expert by:

(a) if the dispute involves the legal interpretation of this agreement or if the parties are unable to agree on whether the dispute involves legal interpretation of this agreement, either party may apply to the President of the Law Institute of Victoria or his nominee to appoint an independent practising barrister or solicitor to resolve the dispute or to determine whether the dispute involves legal interpretation of this agreement, as the case may be;

(b) if the dispute involves a financial or accountancy matter, either party may apply to the President of the Victorian Chapter of the Institute of Chartered Accountants of Australia or his nominee to appoint a practising chartered accountant to resolve the dispute;

(c) if the dispute involves a matter connected with the construction of the Landlord's Works or any part or parts thereof, either party may apply to the President for the time being of the Victorian Chapter of the Royal Australian Institute of Architects or his nominee to appoint a practising architect to resolve the dispute; and

(d) in any other case, the dispute must be referred to a qualified person appointed by the senior officer for the time being of an appropriate associate institute society or board to appoint an independent expert in the relevant field who is prepared to determine the dispute.

12.5 No legal proceedings

A party may not commence legal proceedings (except proceedings seeking interlocutory relief) in respect of a dispute unless this clause 12 has been complied with first.

12.6 Expert's determination binding on parties

(a) Any person appointed under clause 12.3 and 12.4 must act as an expert and not as an arbitrator, and the expert's written determination will be conclusive and binding on the parties.

(b) The expert's fees and expenses must be shared equally between all parties.

12.7 Costs

The costs of any dispute resolution must be shared equally between all parties despite the result of the determination.

6. Although the tenant served its notice of dispute on 22 April and the parties had a meeting in accordance with cl 12.2 on 28 April, no resolution of the dispute was reached. On 5 May the landlord wrote to the tenant stating that there was no basis for an assertion that the agreement had been terminated. It threatened an injunction. On 7 May the tenant's solicitors replied stating that the tenant would not withdraw its notice of dispute and that the dispute should be resolved in accordance with the expert determination process set out in cl 12. The letter sought the landlord's response to the tenant's proposed selection of an expert and concluded that, if the plaintiff did not agree to appoint any of the experts proposed, the tenant would request the President of the Law Institute of Victoria to appoint an appropriate expert in accordance with cl 12.4(a) of the agreement.

7. On 12 May 2009, the landlord filed the writ commencing this proceeding, together with a summons seeking an interlocutory injunction to restrain the tenant from taking any steps to proceed with the dispute resolution procedure in the agreement. On the same day, pursuant to cl 12.4(a) the tenant requested the President of the Law Institute to appoint an expert.

8. On 14 May 2009, the tenant filed an application for a stay of the landlord's proceeding on the ground that it was bound to comply with the dispute resolution process set out in cl 12 of the agreement. Davies J heard that application on 29 May 2009 and granted it on 11 June 2009. After the proceeding was stayed, the Chief Executive Officer of the Law Institute of Victoria, Mr Michael Brett Young, as nominee of the President, appointed an expert as contemplated by cl 12.4(a) of the agreement. The expert was Mr Michael Redfern. However, a few days after his appointment, Mr Redfern advised the parties that he could not accept the appointment because of a conflict of interest.

9. On 24 June 2009, Mr Brett Young appointed Mr Clyde Croft SC in substitution for Mr Redfern. On the same day, Mr Croft wrote to each of the parties enclosing a copy of an agreement containing the terms upon which he would accept the appointment. Those terms included the following:

13. Liability

13.1 Except in the case of fraud:

(a) the Expert shall not be liable to the parties or any of them upon any cause of action whatsoever for anything done or omitted to be done by the expert;

(b) the parties jointly and severally hereby release and indemnify and keep indemnified the Expert against all actions, suits, proceedings, disputes, differences, accounts, claims, demands, costs, expenses and damages of any kind whatsoever (hereafter 'claims'), (including for, but not limited to defamation, bias or other misconduct), whether such cause of action or claims arise:

(i) under or in any connection with contract;

(ii) in tort for negligence, negligent advice or otherwise;

(iii) otherwise at law (including by statute to the extent it is possible so to release, exclude or indemnify) and in equity generally, including without limitation for restitution for unjust enrichment—

arising out of, or in connection with, the Expert Determination.

13.2 The parties' joint and several releases and indemnities to the expert under clause 13.1 include without limitation claims by third parties upon any of the bases set out above (or otherwise):

(a) against the parties, or any of them; and

(b) against the Expert arising out of, or in any connection with, the Expert Determination.

13.3 This document may be produced and relied upon as a complete defence to any such claim.

10. On 26 June 2009, the landlord's solicitors wrote to Dr Croft. They objected to the terms in the agreement he proposed as to the release and indemnity, and requested that he provide a warranty to the effect that he was an appropriate qualified expert in the area of planning law and town planning permits. On 30 June 2009, Dr Croft replied, stating that the exclusion of liability provisions in his agreement were usual provisions found in mediation, conciliation and arbitration

agreements and that he regarded the request for a warranty as unreasonable. He said that in his 30 years of experience in alternative dispute resolution he had always required similar terms and no objection had ever been raised in respect of them. He said the same applied to expert determinations.

11. A preliminary conference was convened on 2 July 2009. However, because the landlord refused to agree to Dr Croft's terms of engagement and, notwithstanding the preparedness of the tenant to provide the requested indemnity, Dr Croft informed Mr Brett Young that he declined the appointment.

12. On 3 July 2009, Mr Brett Young appointed Mr Michael Heaton QC. Similarly to Dr Croft, Mr Heaton proffered an appointment agreement to the parties containing similar release and indemnity clauses to those proposed by Dr Croft. He pointed out that the clauses which the landlord had previously refused to accept were standard in such agreements.

13. On 9 July 2009, the landlord's solicitors wrote to Mr Heaton advising him that their client had a number of concerns about the terms of his proposed agreement, including terms concerned with confidentiality, subsequent proceedings and Mr Heaton's liability. Although a preliminary conference was conducted on 13 July 2009, because of the landlord's refusal to agree to Mr Heaton's terms, like Dr Croft, he too declined the appointment.

14. On 29 July 2009, Mr Brett Young appointed Mr John Nunns in Mr Heaton's place. In his letter to the parties advising them of this appointment, Mr Brett Young said that Mr Nunns would commence communication with the parties only after his terms of engagement were accepted. Those terms included an indemnity and exclusion of liability in similar terms to those proffered by Dr Croft and Mr Heaton.

15. On 30 July 2009, Pagone J heard an application by the tenant for a mandatory injunction compelling the landlord to execute Mr Nunns' agreement. The right to such relief was said to arise from the dispute resolution process found in cl 12 of the agreement to lease. His Honour granted that application and published reasons for

his decision on the same day. The landlord now wishes to appeal Pagone J's decision and, to that end, has sought leave to appeal to this Court if such leave be required. It contends that Pagone J was in error in compelling it to execute Mr Nunns' agreement.

Leave to Appeal

16. Section 17(2) of the *Supreme Court Act 1986* provides that an appeal lies to this Court from any determination of the Trial Division constituted by a judge. However, s 17A(4) restricts that right of appeal by imposing a leave requirement in respect of appeals 'from a judgment or order in an interlocutory application', except in a number of specified cases. One of those cases is where the judgment or order sought to be appealed is one granting or refusing an injunction. Thus, there is an absolute right of appeal to the Court where an injunction is granted, whether interlocutory or final.

17. Pagone J's order is clearly an injunction.[2] It compels the landlord to perform a specified act, namely the execution of Mr Nunns' agreement. Consequently, the landlord has an absolute right of appeal to this Court. The respondent did not contend otherwise. In the circumstances, the application for leave to appeal is unnecessary and should be struck out.

The appeal

18. The resolution of this appeal turns upon a consideration of the obligations mutually accepted by the parties to the agreement and, in particular, the obligations arising from cl 12, the dispute resolution clause and, perhaps, cl 20.4, the 'further assurance' clause.

19. The recitals contained in the agreement acknowledge that the landlord is the registered proprietor of premises occupied by the tenant on a monthly tenancy—a

---

2 *Burns Philp Trust Co Pty Ltd v Kwikasair Freightlines Ltd* (1963) 63 SR(NSW) 492; Meagher, Heydon, Leeming, *Equity, Doctrines & Remedies*, 4th ed, [20–015].

prior lease having expired. At the date of the agreement, 19 November 2008, that tenancy was subject to a notice of termination given by the landlord which would, but for the agreement, have required the tenant to vacate the premises by 10 November 2008. The agreement provided for the monthly tenancy to continue until the landlord completed certain specified building works, at which time it would grant a new lease to the tenant.

20. Following the recitals, the agreement contains clauses dealing with the conditions precedent to its having effect, the terms of the proposed new lease, the contemplated building works, insurance, liquidated damages, assignment of rights under the agreement, further development of part of the premises excluded from the lease, the continuation of the monthly tenancy, termination of the agreement, a guarantee of the tenant's obligations and a number of other terms commonly found in agreements of this nature. Any one of these terms could, depending upon circumstances, create a situation where the resolution of a dispute between the parties would be necessary if the agreement was to subsist. Clause 12, which is set out in full at [5] above, provides a mechanism for the resolution of disputes, differences or failures to agree in connection with any matter arising out of or in relation to the agreement other than disputes as to rent or outgoings.

21. The dispute resolution clause provides that, in the event of a dispute between the parties, one may give the other notice of that dispute following which a meeting must be held to attempt to resolve it. If the dispute is not resolved within seven days of the giving of the notice of dispute, either party may request that the dispute be referred to an appropriately qualified and experienced independent expert. It is important to note that cl 12.4 specifically refrains from imposing any obligation on either of the parties to agree to the selection of an expert put forward by the other. Thus, the agreement does not give either party the power to appoint an expert although a party may, and perhaps usually would, nominate an appropriate expert for the other's consideration.

22. A failure to agree on an appropriate expert immediately brings into play a deadlock-breaking mechanism—the appointment of an expert by an independent third party. This deadlock-breaking mechanism involves a number of steps. First, at least one of the parties must characterise the dispute as being covered by one of the sub-clauses to cl 12.4. As it seems beyond argument that the dispute here concerns 'the legal interpretation of [this] agreement', no question of characterisation arises. In other circumstances it might. Secondly, either party may apply to the appropriate person designated in one of those sub-clauses to *appoint* the expert required by the sub-clause. Thirdly, that person must appoint the expert.

23. The content of the word 'appoint' and its other parts of speech may vary depending upon the context in which they are used.[3] It may, in some cases, be no more than a synonym for 'nominate'. In other cases the power of appointment may include power to set terms or remuneration and even power to specify the functions of the person appointed. In its context in cl 12.4 of the agreement, in this case it must mean the conferring upon the expert selected by the designated appointer of the function of resolving the dispute. If all the appointer could do was 'nominate' an expert, the mechanism provided by the clause could be rendered useless by one party refusing to accept the nomination whether for good or bad reason. The clause must be construed as precluding any objection by a party to the expert appointed by the designated appointer.

24. The part of cl 12.4 concerned with the appointment of an independent expert only becomes effective after the parties have already failed at two levels to resolve their dispute. Discussion pursuant to cl 12.2 must have been unsuccessful and the parties must have been unable to agree on an appropriate expert to resolve the issue between them. It is only at this point that cl 12.4 permits either party to call in an obviously independent third party with presumed knowledge of available experts to appoint such an expert to resolve the dispute. It is unlikely then that the parties'

---

3 *Tradax Export SA v Volkswagenwerk AG* [1971] QB 537, 546 (Edmund-Davies LJ).

agreement would permit frustration of the next step in the dispute resolution process by either of them being able to reject an appointed expert.

25. It follows that under cl 12.4(a) the President of the Law Institute of Victoria is not requested simply to suggest an expert who might, if the parties agree, resolve the dispute. By adopting cl 12.4 in the form they did, the parties have agreed that they will be bound by the President's selection of the expert, provided that his terms of engagement are not unreasonable, and subject to due exceptions such as, for example, a proven lack of independence. If he accepts the function conferred on him by the parties, he will select an independent practising barrister or solicitor to resolve the dispute which they have been unable to resolve by following the course prescribed by cls 12.2 and 12.3. In performing this function he is analogous to an 'introducing agent' of the parties for the purposes of introducing them to the appointed expert, but without the power to conclude a contract between them and the expert. To adopt and adapt Bowstead's description of an 'introducing agent': in so acting, the President of the Law Institute:

> makes no contracts and disposes of no property, but is simply hired, whether as an employee or independent contractor, to introduce parties desirous of contracting and leaves them to contract between themselves.[4]

26. The appointment of an expert pursuant to cl 12.4 does not depend upon any consent of the parties, but it can have no effect as an appointment until the parties have been notified of it and have entered into a contract with him to undertake his duties as an expert to resolve their dispute. The function of the President is to identify the expert, obtain his consent to act and the terms upon which he is prepared to act, and inform the parties accordingly.

27. Although the agreement makes provision in cl 12.6(b) for the expert's fees and expenses to be shared equally between the parties and in cl 12.7 for the costs of any dispute resolution also to be shared equally between the parties irrespective of the

---

[4] FMB Reynolds, *Bowstead and Reynolds on Agency* (18th ed), [1–019].

result of a determination, the agreement is silent as to the fixing of the expert's remuneration and as to any of the other terms upon which he might be appointed.

28. That there must be terms of the expert's appointment is obvious. Fees and expenses contemplated by the agreement must be fixed and his relationship with the parties generally must be regulated. Without such terms he would be left with only a claim in quantum meruit for his fees, and the other terms of his engagement would fall to be imposed by the general law. Doubtless this is why persons appointed as experts, mediators, arbitrators and the like generally require a written retainer before undertaking the task for which they were appointed. The uncontradicted evidence which was before Pagone J was that experts of the type contemplated here are appointed on terms which normally include the terms, or similar terms, to which the landlord objected. It is also clear that, absent such terms, appropriately qualified experts, as selected by the designated appointer, will not accept appointment. It cannot have been the parties' intention that the operation of the elaborate dispute resolution mechanism they agreed upon in cl 12 would be nullified for want of prior agreement on the terms of an expert's appointment when, on the evidence, usual and reasonable terms are commonly requested and agreed to by parties seeking the assistance of an expert or similar person to resolve a dispute. That the term concerning immunity from suit is usual and reasonable is strongly supported by the fact that s 27A of the *Supreme Court Act 1986* confers immunity from suit on referees, mediators and arbitrators when they are appointed by the Court.

29. The silence of the agreement on the question of the expert's terms gives rise to a necessary implication that his appointment will be on terms which are reasonable having regard to the qualifications he has, the function he is to perform, the expertise he is to bring to his task and the responsibility which he is to undertake. Without such a term, this agreement would be unworkable. The fact that, on the evidence, the content of such a term can be readily ascertained lends weight to a conclusion that it should be implied and answers any contention that it is uncertain. The fact that the agreement is silent as to the expert's terms indicates the necessity for the

implication of the term suggested. It is reasonable and equitable. It is necessary for the effective operation of the agreement. On the evidence, it is so obvious that it 'goes without saying'. It is capable of being clearly expressed and it contradicts no express term of the contract.[5]

30. After Mr Redfern disqualified himself because of a conflict of interest and withdrew his acceptance of his appointment as an expert, Mr Brett Young appointed Dr Croft SC, Mr Heaton QC and Mr Nunns in turn. If the analysis of the legal position of the parties to the litigation set out above is correct, the landlord was in fact obliged to accept Dr Croft as the expert to resolve its dispute with the tenant, subject only to Dr Croft's terms of engagement being reasonable. Having regard to what actually occurred, however, an inquiry as to the reasonableness of Dr Croft's or, for that matter, Mr Heaton's terms of engagement would now be of no utility. By successive requests to Mr Brett Young to appoint an expert after the landlord rejected first Dr Croft and then Mr Heaton, the parties impliedly varied their agreement to permit three appointments, the last of which, of Mr Nunns, is still subsisting, subject only to *his* terms of engagement being reasonable. Mr Nunns' terms are before the Court. They are similar in effect to Dr Croft's, if less elaborate. No argument was put by the landlord that those terms were unreasonable or otherwise inappropriate.

31. Pagone J found on the evidence before him that the terms upon which Mr Nunns was prepared to accept appointment were:

> A likely and obvious consideration upon the appointment of any person to act as an expert in the resolution of the dispute of the kind contemplated by cl 12.4 and, indeed, is a requirement which of its nature is calculated to bring finality to the controversy.[6]

---

5 *Hawkins v Clayton* (1988) 164 CLR 539, 573 (Deane J); *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (PC); *Secured Income Real Estate (Australia) Limited v St Martin's Investments Pty Ltd* (1979) 144 CLR 596, 605–6; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 347; *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41, 66.

6 [2009] VSC 317, [7].

32. The evidence before Pagone J was convincing that terms of the type sought by Mr Nunns were probably universally required by persons prepared to act as experts in the resolution of disputes of the nature with which this case is concerned. Not only did Dr Croft and Mr Heaton seek similar terms, but terms to like or similar effect were to be found in a number of draft agreements exhibited to an affidavit filed by the tenant. These draft agreements, designed for use by experts such as those with which we are presently concerned, were published by organisations such as the Australian Commercial Dispute Centre, the London Court of International Arbitration, the Academy of Experts (London) and the Rail Industry Dispute Resolution (UK). No evidence contradicting that affidavit was filed and counsel for the landlord conceded, in argument, that he was unable to put forward any examples of experts being retained on other than terms similar to those sought by Mr Nunns.

33. The terms of engagement sought by Mr Nunns were, on any view of the evidence, reasonable. Accordingly, the landlord was bound by its agreement with the tenant to accept Mr Nunns as an expert for the resolution of the dispute which it has with the tenant upon the terms set out in his draft agreement. It follows that it was obliged to execute Mr Nunns' terms of engagement so as to permit him to carry out his functions under his appointment pursuant to cl 12.4(a) of the agreement.

Further assurance clause

34. Clause 20.4 of the agreement provides:

> **20.4 Further assurances**
>
> Each party must promptly execute all documents and do all things necessary or desirable to give full effect to the arrangements contained in this agreement.

35. In argument on this appeal, counsel for the tenant submitted that this clause could be called in aid by his clients in support of a submission that the landlord was bound to execute the terms of the engagement of Mr Nunns.

36. Quite aside from the existence of cl 20.4, a party in the position of the landlord in this case would be legally obliged to execute the document proffered by Mr Nunns. This follows from the fact that the appointment of Mr Nunns carried with it the reasonable requirement that he be indemnified and released from liability in respect of the carrying out of his function as an expert. In *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd*,[7] the High Court considered the obligations of a party to a lease where the appointment of an arbitrator was required for the fixing of rent to be paid upon the exercise of an option for a new lease. That there was an implied term in the agreement to grant the lease to the effect that both parties would do all that was reasonably necessary to procure the nomination of an arbitrator to fix the rent was regarded by the majority in the High Court as self-evident.[8] Their Honours referred to *Butts v O'Dwyer*[9] and to the then recently decided case of *Sudbrook Trading Limited v Eggleton*.[10] The implied imposition of such an obligation is not new. In 1881, Lord Blackburn said in *Mackay v Dick*:

> as a general rule . . . where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.[11]

37. This passage was quoted by Mason J in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*[12] and by the majority in the recent case of *Campbell v Back Office Investments Pty Ltd*.[13] The case for requiring the landlord here to execute Mr Nunns' agreement is *a fortiori*.

38. On its face, the further assurance clause in the agreement also requires the landlord to execute Mr Nunns' agreement. Even on the argument presented by its

---

7 (1982) 149 CLR 600.

8 At 605.

9 (1952) 87 CLR 267.

10 [1983] 1 AC 444.

11 (1881) 6 App Cas 251, 263.

12 (1979) 144 CLR 596, 607.

13 (2009) 238 CLR 304, 358 [169] (Gummow, Hayne, Heydon and Kiefel JJ).

counsel on this appeal that cl 20.4 extended only to the execution of documents which, under the terms of the agreement, are required to implement the agreement, the landlord would be required to execute it. Once there is an implied term that the expert is retained on reasonable terms to resolve the dispute between the parties, the execution of the expert's retainer agreement is impliedly required by the agreement. In the circumstances, cases such as *GPI Leisure Corporation Limited v Herdsman Investments Pty Ltd*[14] and *Fox Entertainment Precinct Pty Ltd v Centennial Park and Moore Park Trust*[15] on which the landlord relied are not to the point. In those cases, there was no contractual obligation (of the kind cl 12.4(a) imposes on the parties in this case) to engage an expert appointed as here, and, therefore, nothing on which the further assurances provision in those cases could operate to give better effect to. In the circumstances, cl 20.4 adds little or nothing to the obligations already imposed upon the landlord by virtue of the agreement itself and its implied terms. It must execute Mr Nunns' agreement.

Conclusion

39. Counsel for the landlord submitted that, even if the tenant's case as to the implementation of cl 12.4 was accepted, the only order the Court should have made was that the order of Davies J staying the landlord's proceeding be continued, thus giving the parties the opportunity to complete the dispute resolution procedures prescribed by that clause. But if the Court did no more than continuing to stay the landlord's proceeding, a stalemate would have been the most likely result. By imposing an injunction on the landlord, Pagone J ensured that the dispute resolution procedure would be carried out to its conclusion. It was an appropriate exercise of the Court's equitable auxiliary jurisdiction in aid of legal rights.

---

14 (Unreported, Supreme Court of New South Wales, Young J, 24 November 1989).

15 [2004] NSWSC 214, (2004) 11 BPR 21,629.

40. In the circumstances of this case, the injunction granted by Pagone J on 30 July 2009 was entirely appropriate. The landlord's appeal from his decision should be dismissed. The orders of the Court should be that:

1. The application of 1144 Nepean Highway Pty Ltd for leave to appeal from the order of The Honourable Justice Pagone made herein on 11 June 2009 be struck out as incompetent;

2. That 1144 Nepean Highway Pty Ltd's appeal against that order be dismissed.
